

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONI RAE ALLEX, Y,

Defendant and Appellant.

C066883

(Super. Ct. No.
CM28182)

APPEAL from a judgment of the Superior Court of Butte County, Sandra L. McLean and Steven J. Howell, Judges. Affirmed.

Francine R. Tone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein, and Janet E. Neeley, Deputies Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

In this opinion we explain the procedure a trial court must follow if it chooses to impose sex offender registration on a defendant whose crime does not *require* registration.

The law allows a court to impose sex offender registration "if the court finds *at the time of conviction or sentencing* that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. . . ." (Pen. Code,¹ § 290.006, italics added.)

Here, the defendant pled guilty to child endangerment, the trial court imposed sentence but suspended execution of that sentence, placed her on probation, and told her if she violated that probation, it would order her to register as a sex offender. She violated probation and the court then ordered her to register.

The procedure the trial court followed was wrong. It failed to decide at the time it *imposed* sentence whether defendant would have to register. If a trial court wants to use the specter of sex offender registration as a basis for encouraging a defendant to comply with the terms of probation (as it appears the court here wanted to do), there is a way to do so without violating section 290.006. A trial court may *suspend imposition of sentence* and place a defendant on probation, thereby leaving any decision to impose sex offender registration to the time the court sentences the defendant. The

¹ All further section references are to the Penal Code.

court's procedural error does not require reversal here, though, because any argument regarding the court's error was forfeited or invited because counsel acquiesced to the court's procedure.

FACTUAL AND PROCEDURAL BACKGROUND

A

Defendant's Criminal Conduct

Defendant Toni Rae Allexy was a 38-year-old cheerleading coach and mother of a cheerleader when she invited to her house a 14-year-old football player (the victim) to whom she was attracted and encouraged him to drink alcohol with her and his friends.

After getting the victim drunk and becoming "'beyond drunk'" herself, defendant followed the victim into her computer room where she drew her initials in lipstick on the victim's cheek. She then took the victim's football jersey off of his body, put it on herself, and took a picture of herself sitting in the victim's lap. She sent the picture to the victim's ex-girlfriend with a text message saying, "'Don't you wish you were here?'"

Defendant then insisted (over her husband's objections) on driving the victim and his friends home in her truck. She made the victim sit in the front seat with her and the three others sit in the back. While driving, defendant put "her hand down [the victim's] pants on his penis," and for three to five minutes she "strok[ed] [the victim's penis] in an up and down motion as she drove them home." The victim "did not want 'this lady's hand in [his] pants.'" He "'kept glancing back at [one

of the other teenagers who had asked to sit in the front]'" because the victim "'knew [defendant] would stop if [somebody else] got in the front seat.'" But defendant told that teenager "to stay in the back seat [sic]." The victim kept telling that teenager to "get up front with them and when [that teenager] finally climbed into the front seat[, defendant] removed her hand from [the victim's] pants and gave [the other teenager] this 'weird look.'"

After being molested by defendant, the victim fell into a "'tail spin.'" He used to "ha[ve] lots of positive friends and was doing well in school." After he disclosed the molest, he was "ridicule[d] by his friends," called a "'liar,'" and "beat[en] up by other students at school." "As a result[,] he quit school, began drinking alcohol and using drugs," and ran away "from his mother's home." His self-esteem is "basically non-existent."

B

*Court Proceedings In Front Of The First Judge*²

Defendant pled no contest to felony child endangerment and the court dismissed five other counts against her, including committing a lewd act on the victim, with the understanding the court could consider the facts behind the dismissed counts at sentencing.

² Steven J. Howell.

The court sentenced defendant to four years in prison, suspended execution of that sentence, and placed her on probation for four years with the understanding that if she "fail[ed] to comply with the terms and conditions of probation, she will be required to register as a sex offender." After the court made that order, defense counsel stated, "I think the Court has made it abundantly clear. We had anticipated that would be one of the alternatives the Court would consider."

C

Defendant Violates Probation Twice

About a year after being sentenced, defendant violated probation twice. The first time was for having unauthorized contact with children at a skate park and lying about it. The second time was for embezzling over \$10,000 from her employer.

About the time of these violations, defendant's sex offender therapy counselor reported that "even though [defendant] was attending regularly, she never accepted responsibility for her offense and showed no empathy for her victim."

D

Proceedings Before The Second Judge³

Based on defendant's poor performance on probation, the court revoked defendant's probation and executed the previously-

³ Sandra L. McLean.

ordered four-year prison sentence. The court ordered her to register as a sex offender.

E

Contentions On Appeal

Defendant timely appeals with a certificate of probable cause. She raises two contentions: one, the trial court abused its discretion by failing to identify and state reasons to justify the sex offender registration; and two, the trial court violated her right to a jury trial when it imposed registration. The first contention is forfeited and the second is not prejudicial.

DISCUSSION

I

Proper Procedure When Imposing Sex Offender Registration

Before turning to the issues defendant raises, we address the proper procedure a trial court must follow when imposing sex offender registration in a case that does not require registration.

Section 290.006 allows a court to impose registration "if the court finds *at the time of conviction or sentencing* that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. . . . " (Italics added.) The plain language of the statute requires the court to decide whether to impose sex offender registration either at the time of conviction or at the time of sentencing. It does not allow the court to sentence defendant and then defer the registration decision. If a trial court wants to use the specter of sex

offender registration as a basis for encouraging a defendant to comply with the terms of probation, there is a way to do so without violating section 290.006. A trial court may suspend imposition of sentence and place a defendant on probation (see § 1203.1, subd. (a)), thereby leaving any decision to impose sex offender registration to the time defendant is sentenced.

Here, the procedure the trial court followed was wrong. It failed to decide at the time it *imposed* sentence whether defendant would have to register. Rather, it bifurcated the procedure by imposing sentence (instead of suspending imposition of sentence) and deferring a decision about whether defendant had to register. There was no statutory basis for the court's bifurcated procedure.

Defendant did not raise this procedural error either in the trial court or on appeal. This is understandable. Despite the serious nature of defendant's conduct, she was allowed to plead no contest to one count of felony child endangerment with the dismissal of five other counts (including committing a lewd act on the victim) and placed on probation without requiring her to register as a sex offender. Defense counsel would have had no tactical reason to point out the court's error in not making a decision on registration at the time of sentencing because the court gave defendant the opportunity to escape registration by simply complying with her probationary terms. And, on appeal, any argument regarding the error in the court's bifurcated proceeding would have been either forfeited or invited, given that trial counsel did not object and indeed acquiesced to the

court's procedure in return for giving his client the chance of escaping the registration requirement by complying with her probationary terms.⁴

II

Defendant Has Forfeited Her Claims Regarding The Court's Failure To Articulate Certain Findings

Defendant contends the court abused its discretion in imposing sex offender registration because it failed to "identify and state reasons to justify" the sex offender registration. In raising this contention, defendant claims the court made two errors: one, the court failed to state reasons supporting a finding she committed the offense of child endangerment as a result of sexual compulsion or sexual gratification; and two, the court "failed to state a single reason to support a finding [she] was likely to re-offend."

⁴ Specifically, the court remarked as follows, "I want it understood that any judge who hear[s] the case would be able to make that order [for sex offender registration] in the event that your client failed to comply with the probation conditions. Is that agreeable with the defense?" Defense counsel responded, "I think the Court has made it abundantly clear. We had anticipated that would be one of the alternatives the Court would consider."

A

*Defendant Has Forfeited The Issue Of The Court's Failure To
State Reasons Why It Found Defendant Committed The Offense As A
Result Of Sexual Compulsion Or Sexual Gratification*

Defendant contends the court failed to state reasons supporting a finding she committed the offense of child endangerment as a result of sexual compulsion or sexual gratification. This requirement is statutory, i.e., the court may impose sex offender registration "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. *The court shall state on the record the reasons for its findings* and the reasons for requiring registration." (§ 290.006.)

The first judge made the finding defendant committed the child endangerment for the purpose of sexual gratification. In making that finding, the court and the parties had the following exchange:

"THE COURT: [P]ursuant to 290.006, I wish to make a finding that this offense was committed with the intent that the defendant receive sexual gratification. I want it understood that the 290 registration required under 290.006 will be imposed if there is an unsuccessful completion of this four years['] probation.

"I want it understood that any judge who hear[s] the case would be able to make that order in the event that your client

failed to comply with the probation conditions. Is that agreeable with the defense?"

"[DEFENSE COUNSEL]: I think the Court has made it abundantly clear. We had anticipated that would be one of the alternatives the Court would consider.

"THE COURT: [Prosecutor], any objection legally in proceeding in that fashion to your knowledge?"

"[THE PROSECUTOR]: No, your Honor.

"THE COURT: All right, the Court will make that finding. . . ."

By not *contemporaneously* objecting to the court's failure to state reasons why it found defendant committed the offense for sexual gratification, defendant has forfeited this claim. (*People v. Bautista* (1998) 63 Cal.App.4th 865, 868-871.) In fact, prior to the court making the finding, defense counsel stated, "if the Court does want to make the finding, that the offense was committed for purposes of sexual gratification . . . I believe that would be appropriate." While two years later at the hearing where the court executed defendant's four-year prison sentence, defendant's newly-hired counsel objected to the trial court's previous failure to state reasons at the sentencing hearing, that objection was too late, as the People noted. Had the failure to state reasons been brought to the court's attention when the court made the finding defendant committed the offense for sexual gratification, "[t]his routine defect could easily have been prevented and corrected." (*Id.* at p. 868, citing *People v. Scott* (1994) 9 Cal.4th 331, 353.)

B

*Defendant Has Forfeited The Issue Of The
Court's Failure To State Reasons Supporting
A Finding Defendant Was Likely To Reoffend*

At the time the second judge imposed the registration, the court gave the following reasons it was exercising discretion to require defendant to register as a sex offender: (1) "she did not successfully complete her probation"; (2) "she admitted on the plea form . . . that she committed a lewd act"; (3) "all of the victims feel that they were violated and requested registration . . . so they could heal"; (4) "she has been repeatedly dishonest during her probationary period"; and (4) "she was given an opportunity to avoid registration . . . [and s]he violated her probation not once but twice"

Defendant contends the court abused its discretion in imposing registration because it "failed to state a single reason to support a finding [defendant] was likely to re-offend." Defendant's argument comes from case law. There is a case stating, "[s]ince the purpose of sex offender registration is to keep track of persons likely to reoffend, one of the 'reasons for requiring registration' under section 290.006 must be that the defendant is likely to commit similar offenses--offenses like those listed in section 290--in the future." (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 78.) We need not decide whether this is a correct statement of law. Even if it is, this appellate challenge has been forfeited by defendant's failure to object to the court's statement of

reasons of why it was exercising its discretion to have defendant register. (*People v. Bautista, supra*, 63 Cal.App.4th at pp. 868-871.) Defendant points us to nowhere in the record where she objected to the court's statement of reasons, and we have found none.

III

Any Violation Of Defendant's Right To A Jury Trial Was Harmless Beyond A Reasonable Doubt

Based on the 2006 passage of Proposition 83 (known as Jessica's Law), a residency restriction is imposed on persons required to register as sex offenders. (*In re E.J.* (2010) 47 Cal.4th 1258, 1263.) The residency restriction statute provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b).)

Defendant contends (as she did in the trial court) this residency restriction makes sex offender registration punishment, and thus the facts required for the trial court to impose a sex offender registration requirement had to be found by a jury beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] and its progeny. Because no such jury finding was made here, defendant contends the sex offender registration requirement should be "reversed."

Several appellate courts have reached conflicting results on the issue of whether the residency restriction attached at

sentencing constitutes punishment under *Apprendi*, and the issue is currently pending before the California Supreme Court.

(*People v. Mosley* (2010) 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965 [residency restriction is punitive and subject to *Apprendi* rule]; accord, *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted Mar. 2, 2011, S189721; *In re S.W.*, review granted Jan. 26, 2011, S187897 [residency restriction is not punitive and hence not subject to *Apprendi* rule].)

For the sake of argument, we will assume defendant is correct in claiming the trial court erred in requiring her to register as a sex offender without having a jury find the predicate fact required to impose a registration requirement. We will also, for the sake of argument, assume that the People's ripeness challenge to this argument is not well taken. Thus, the question becomes whether the failure to submit the factual issue to a jury was prejudicial. It was not.

The test for prejudicial error is whether we are convinced beyond a reasonable doubt that a jury would have made the factual finding necessary for the court to impose the sex offender registration requirement on defendant under section 290.006. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837-838 [applying the beyond-a-reasonable-doubt standard to the trial court's imposition of the upper term based on aggravating factors found by the court and not the jury].)

The only factual finding section 290.006 requires before the trial court can exercise its discretion to impose a sex

offender registration requirement is "that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." Here, we conclude beyond a reasonable doubt that a jury would have made the same finding the court did, i.e., defendant committed the felony child endangerment for sexual gratification.

Defendant was attracted to the victim and put him and the other teenagers she was driving in an extremely dangerous position so she could molest the victim without anybody's interference. She got him drunk and insisted over her husband's objection that she drive the victim and his friends home. She ensured she and the victim were the only ones in the front seat of her car. She would not let anybody sit with her and the victim. When she started molesting the victim, he "'kept glancing back at [one of the other teenagers who had asked to sit in the front]'" because the victim "'knew [defendant] would stop if [somebody else] got in the front seat.'" But defendant told that teenager "to stay in the back seat [*sic*]." The victim kept telling that teenager to "get up front with them and when [that teenager] finally climbed into the front seat[, defendant] removed her hand from his pants and gave [the other teenager] this 'weird look.'" The victim said defendant had "her hand down his pants on his penis for 'three to five minutes'" and "'she was all over the road [be]cause she had one hand in my pants and one hand on the wheel. . . . She was driving over the double yellow line, and even off of the roadway as she touched my penis.'" On this record, even assuming it was error for the

court, instead of a jury, to make the factual finding required by section 290.006, that error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.